BOOK REVIEWS.

CHARLES S. BULKLEY, *Editor-in-Charge.*

THE PHILOSOPHY OF PROOF: IN ITS RELATION TO THE ENGLISH LAW OF JUDICIAL EVIDENCE. By J. R. GULSON. London: George Routledge & Sons, Limited. New York: E. P. Dutton & Co. 1905. pp. xiv, 496.

Though this book has been long in finding its way across the Atlantic to the American reviewer's table, it is not one to be lightly dismissed on that account. Both for its unusual merits and its too obvious defects it demands consideration. In both ways it serves a useful purpose—instructing and stimulating the reader by its profound discussion of the logical basis of our system of evidence, while exhibiting to him the dangers which lurk in the abstract and theoretical treatment of the most practical and concrete of sciences.

Let it be said at once that the author has not committed the capital error—which the title and the earlier half of the book threaten—of attempting to rewrite the law of evidence from the logician's point of view. His work is an examination of the English law of evidence as set forth in the pages of Taylor, Best and Stephen, but it is a criticism, not an exposition. For this reason his occasional lapses into error as to the actual state of the law, his neglect of its history, his complete ignoring of the American law, even his lack of acquaintance with the English cases are excusable. He writes not as a lawyer, nor yet as a student of jurisprudence, but as a philosopher seeking to ascertain the extent to which the practice of the courts in the admission and rejection of evidence conforms to the canons of the science of reasoning.

It must be conceded that no part of our law stands more in need of the refreshment that comes from turning fresh streams of thought upon it, as none has grown to its present great stature in more haphazard fashion than the body of rules regulating the admission of evidence. The various branches of our substantive law have developed under the influence of great considerations of private and social justice or of public policy; even the rules of pleading have been redeemed from an arid technicality and infused with the life that flows from the prevailing conceptions of remedial justice. But no fixed star has guided the course of the law of evidence. Shaped from generation to generation by the exigencies of the moment, it stands to-day a monument to the judicial distrust of the jury as an instrument of justice.

That with such a history the law of evidence should to-day constitute a veritable system and be capable of philosophical treatment is no mean tribute to the corporate wisdom of the English and American judiciary and vindicates the faith that there is a divinity that shapes the ends of justice. Thus conceived, and quite apart from its extraordinary historical interest, the law of evidence presents one of the most fascinating problems in the whole range of jurisprudence; and it is not a little remarkable that it should have found so few to deal with it from the philosophical point of view. With the exception of Bentham's ill-tempered and doctrinaire treat-

ment and the thoughtful exposition of Best, it can almost be said to have had no literature of this sort prior to the appearance of the work under review.

It can safely be said of Mr. Gulson's volume that it is an extremely interesting and valuable contribution to the scientific study of the subject. It is acute, well-reasoned and, within the narrow limits above indicated, thoroughly well-informed. Whether the author is a lawyer or not, we are not informed—his avoidance of cases would seem to indicate the contrary—but he displays a firm grasp of the principles of the law as expounded by his English authorities and certainly no lawyer who has to deal critically with the rules of evidence can afford to ignore his discussion. It is obvious that a critical intelligence, dealing fearlessly and without professional bias with such a system as that of evidence, will find plenty of fallacies to expose, and this has been our author's happy lot. He has, it may be hoped, definitely disposed of the notion that documents constitute an independent and distinctive kind of evidence by bringing them and their contents, when produced in court, into the category of "real evidence" (270, 342), and he has robbed this category of the ambiguity with which Bentham, Best and other writers had invested it by classing as real evidence every fact which is directly manifested to the senses of the tribunal (pp. 194, 275, 280, etc.). Indeed, his whole treatment of the subject of writings (pp. 338-387) is illuminating and convincing. He is at his best, however, in the more formal and rigorous parts of his work, as in his discussion of the nature of an inference and of the effect of the coincidence of evidentiary facts and in his analysis of direct and circumstantial evidence. It is in this searching analysis of the reasoning processes to which evidence appeals and by which its relevancy and probative force are determined, rather than in its detailed analysis and criticism of particular doctrines, that the student will find the book of most value. It will not be easy reading, but it will be worth all the labor it costs to master it.

The faults of the book, to which even its conspicuous merits cannot blind us, are neither few nor insignificant. Its very form and arrangement provoke criticism. Part I, dealing with "Natural Evidence," in twenty-two chapters, is largely duplicated in a Part II of twenty-six chapters on "Judicial Evidence." As the first part involves a continuous criticism of the doctrines of Bentham, Best and other writers on judicial evidence and does in fact deal mainly with such evidence, it is hard to see why it was thought necessary or desirable, at the expense of endless repetition, to relegate the more detailed examination and criticism of the doctrines of judicial evidence to a separate division of the work. The author's adoption of the misleading maxim, "Hearsay is not evidence"—which means only that it is not *admissible* evidence—is matched by his acceptance of Stephen's confusing definition of "relevancy," which identifies relevancy with admissibility and so destroys its value as an independent test of admissibility. From this confusion of terms arises the awkward grouping of certain facts as "facts deemed to be relevant," which has reference not to facts logically irrelevant, to which the law attaches a mysterious probative quality, but to facts really relevant and tending logically to establish the *factum probandum,* but, for one reason or another, excepted from the rule exclud-

ing hearsay evidence. The author's contention that evidence of reputation is hearsay (p. 305) seems to be due to an uncritical failure to discriminate between the fact testified to and the inference to which it leads. The knowledge of the witness—that the community in which X resides has such an opinion of him, speaks thus of him—is immediate and direct, and it is to this and this only that he testifies; the rest is inference for the jury.

There is a curious lack of historical perspective in the statement (p. 288) that the judges "have arrogated to themselves the right of deciding those issues of fact which turn only upon direct real evidence," *i. e.*, upon writings submitted to the court, as well as in the implication (p. 291) that it is an unwarranted stretch of judicial power to pass upon any evidence not "real." These are errors which even a slight acquaintance with the writings of Brunner or of Prof. Thayer would have obviated. The treatment of the topics of Burden of Proof and Presumptions, which would lend themselves admirably to the author's method, is perfunctory and unsatisfactory. It is to be regretted that in dealing with presumptions he did not take the obvious step of taking irrebuttable or conclusive presumptions out of that doubtful category and of referring them to the several branches of the substantive law to which they belong.

There are other errors in the book, but enough has been said to show that, with all its merits, the work is not an infallible guide. But the reviewer has failed in his aim if he has not left in the minds of his readers the conviction that, with all its faults, the book is one which the serious student of the law of evidence cannot afford to ignore.

A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES. By FREDERICK VAN DYNE, LL.M. Washington: Frederick Van Dyne. 1907. pp. xviii, 527. The Lawyers' Co-operative Publishing Co., Selling Agents. Rochester, N. Y.

The great tide of immigration which has been pouring upon our shores in recent years, and one or two events which have occurred in this country, have directed attention to this subject and to the kindred one of naturalization in a manner to arouse public interest more keenly than for a long time. From 1828 till 1903 there were no changes of special moment in the statutes governing naturalization, but since that time the legislation has been considerable, and in some respects marks a radical departure from that which had preceded. It was therefore timely that there should be a work devoted to this subject, which should embody the present condition of the law, both as to the successive statutory enactments, and the construction placed upon them, and this is now furnished in the volume entitled "Naturalization in the United States" by Frederick Van Dyne, and is a fitting supplement to the earlier volume by the same author, "Citizenship of the United States."

There are two distinct view-points in dealing with the subject of naturalization, one that of the Courts, which are asked to admit an alien to citizenship or to pass upon the validity of the proceeding or order by which he was admitted, and the other that of the executive or administrative branch of the government. The former is controlled entirely by the acts of Congress and the interpretation placed upon those acts by various